

terminate calls to the other's customers and, in general, each should determine how to bill its own customers for any costs associated with its portion of providing this interconnectivity.^{34/} As Cox has shown, the incremental LEC cost of terminating traffic is, on average, a miniscule 0.2 cents per minute. The cost of measuring and collecting for the exchange of traffic is likely to approach or even exceed this cost, thereby offsetting the net amount to virtually zero. Therefore, any LEC (or CMRS) claims of revenue shortfalls as a result of bill and keep would be inconsequential. In addition, bill and keep is vastly preferable to a system that perpetuates a LEC "entitlement" to earning rates for interconnection that greatly exceed incremental costs. The Commission's model of mutual, reciprocal compensation must reflect the important distinction between the LECs' view that they are providing a "service" to CMRS providers when terminating traffic and the more pro-competitive view that the two co-carriers are providing a mutual benefit to each other by exchanging traffic.

a. An Access Charge Model Should Not Be Adopted For LEC-to-CMRS Interconnection.

LEC-to-CMRS reciprocal compensation arrangements and standards should not be based on either the access charge paradigm which governs interconnection between the LECs and interexchange carriers or on a version of "expanded interconnection" arrangements. The nature of the interconnection relationship between a CMRS network and a LEC network has never been and is not now an access charge relationship or a relationship that relies on the

^{34/} As Cox describes below, under a meet point arrangement, both carriers would share the cost of the facilities required to meet for interconnection.

interconnector to provide a "contribution" to LEC overheads. Significantly, the Commission's Notice recognizes that the imposition of access charges on CMRS providers could have an extremely negative impact on the Commission's pro-competition agenda.^{35/} The TCA requires that LEC-to-LEC interconnection, including transport, not exceed incremental cost and expressly permits bill and keep.^{36/} The Commission should follow that lead here.

The Commission consistently has determined that LEC interconnection offered to radio common carriers should not be subject to access service tariffs and that switched access charges should not apply to mobile radio operations.^{37/} In fact, the Commission rejected BOC attempts to impose a Radio Common Carrier-specific Feature Group E access charge precisely because of its concern that the imposition of BOC charges on local co-carriers for subsidy elements in the exchange of traffic is inappropriate.^{38/}

^{35/} See Notice at ¶ 68 (declining to impose the common carrier line ("CCL") charge and the transport interconnection charge ("TIC") on CMRS providers interconnecting with LEC networks).

^{36/} See 47 U.S.C. §§ 252(d)(1)(A)(i) and 252(d)(2)(B)(ii).

^{37/} See MTS and WATS Market Structure, Memorandum Opinion and Order, 55 RR 2d 785, 818-19 (1984); see also The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 RR 2d 1275, 1284 (1986); recon., 2 FCC Rcd 2910, 2913-14 (1987); further recon. 4 FCC Rcd 2369, 2373 (1989).

^{38/} See 55 RR 2d at 819 ("The RCCs [radio common carriers] provide "exchange service" under Section 2(b) and 221(b) of the Communications Act, and we have consistently treated the mobile radio services provided by the RCCs and telephone companies as local in nature.") (citing "FCC Policy Regarding Filing of Tariffs for Mobile Service, 53 FCC 2d 579 (1975); Public Notice, FCC Announces New Policy Regarding Filing of Mobile Tariffs, (continued...)

The usage based nature of these charges is another major flaw in applying a variant of access charges for any part of LEC-to-CMRS interconnection. To achieve an economically efficient result, pricing should not be based on a usage sensitive rate but on the incremental cost of adding any needed capacity to terminate traffic for the interconnecting party. This would allow the interconnector to pay a flat rate capacity charge and have the right to use the capacity at any time. The actual, incremental cost of the capacity would be defrayed by the charge. Once the capacity is put into place, the interconnector then has the reserved capacity and the incentive to utilize it efficiently because there is no additional usage charge.

An inquiry or decision on appropriate capacity changes is, however, plainly unnecessary as a predicate to ordering an interim period of bill and keep. The LECs are currently providing CMRS operators with interconnection without any strains on their existing network capacity and it is reasonable for the FCC to conclude, as have many states, that no capacity short falls will occur over the short term. Once the Commission has experience with bill and keep, it can determine whether there is a continuing need to develop reserved capacity charges.

Another significant drawback to access charges as a competitive interconnection method is that they contain LEC revenue requirements for LEC overhead and embedded plant. While the Commission has indicated for some time its intention to reform existing access charges, the appropriate vehicle for this reform is not in the LEC-to-CMRS

38/ (...continued)

1 FCC Rcd 830 (1965); Cellular Communications Systems, 86 FCC 2d at 483-84, 504).

interconnection docket but in the implementation of the TCA. Loading LEC overhead and embedded plant contributions onto CMRS interconnectors not only will prevent their development as meaningful LEC competitors, but it also would be inconsistent with the incremental pricing provisions contained in the TCA for LEC interconnectors.^{39/}

The fundamental problems in LEC interconnection rates have been the flouting of co-carrier mutual compensation requirements and the imposition of inflated, usage-based interconnection rates. It is a testament to the LECs' enduring market power that they can refuse to acknowledge co-carrier status and impose access charge-type per minute interconnection rates on competitors and yet claim their commitment to competition. If the Commission seeks to achieve any meaningful reform of anticompetitive interconnection arrangements, it must not base LEC-to-CMRS interconnection on a variant of existing access charge rules or create any CMRS subset of LEC access charges.

b. Bill and Keep Is an Appropriate Mutual Compensation Model for LEC-CMRS Interconnection.

As described in detail in the Brock studies filed in Docket No. 94-54 and referenced by the Notice, bill and keep is an economically sound method of interconnection where either: 1) the incremental cost of terminating traffic is so low that there is little difference between a cost-based and zero rate; or 2) the traffic is approximately balanced between the

^{39/} Section 252(d)(2) of the TCA mandates charges for the transport and termination of co-carrier traffic be based on a "reasonable approximation of the additional costs of terminating such calls." See 47 U.S.C. § 252(d)(2) (emphasis added). Accordingly, the imposition of access-type subsidy charges in the context of LEC-to-LEC interconnection is precluded under the express terms of the TCA.

interconnecting co-carriers.^{40/} Moreover, if the cost of measuring traffic and settling for net differences is roughly the same as the cost of transporting and terminating traffic, then even a de minimis cost disappears and there is no economic consequence to the interconnectors' exchange of traffic. LEC-to-CMRS interconnection reflects the first of these characteristics now and with the deployment of new digital CMRS technologies is likely soon to reflect the second. Therefore, the Commission should embrace a bill and keep mutual compensation model for interconnection as the most easily implemented, economically efficient, fair and deregulatory interim solution available.

The first operational U.S. commercial PCS system -- American Personal Communications ("APC") in the Baltimore-Washington MTA -- already has reported an approximate balance of traffic between Bell Atlantic and APC.^{41/} Based on this experience, an assumption of roughly balanced traffic over the long run in PCS markets is reasonable, particularly as competition continues to develop between local wireless and wireline providers. The same is likely to be true of cellular as cellular converts to digital systems and responds to new market opportunities. Under such circumstances, it is economically efficient for co-carriers to bear the costs of interconnection of their own networks, avoiding the unnecessary and costly burdens of creating systems for the measurement of traffic levels and

40/ See MCI v. FCC, No. 95-70519 (9th Cir. January 31, 1996).

41/ See Mobile Phone News, "Mail Call: More on Personal Experiences with Cell Phones," February 6, 1996 (reporting that almost half of APC's calls go to handsets from landline carriers, bucking the normal cellular trend of only 20 percent of calls originating from fixed phones).

settling accounts and of litigating requests for interconnection in expensive and lengthy regulatory proceedings.

The Notice also requests comment on the desirability of establishing a presumptive per minute uniform interconnection rate for LECs and CMRS providers,^{42/} including potentially setting a rate of 1 cent per minute. Not only would the Commission be setting an exchange rate far in excess of the LECs' true incremental cost, there are competitive reasons why the uniform rate would disadvantage the CMRS provider. Unless balanced traffic can be assured -- an impossibility at this stage in the development of wireless local competition -- the setting of a uniform but arbitrary interconnection rate above LEC incremental cost could well result in the perpetuation of the LEC bottleneck monopoly. Specifically, the imposition of fixed and inflated interconnection rates would affect the types of services and flat rate price structures that CMRS providers competing with the LECs could offer to their customers in competition with the LECs. Such an unnecessary pricing distortion places potential competitors at a grave disadvantage vis-a-vis the LECs.

In addition, no competitor can guarantee for all time that its traffic flows will be roughly balanced. Accordingly, the exchange of traffic at an arbitrary, inflated rate -- such as one that is five times the incremental cost, as a one cent per minute charge would be -- may well require new competitors to pay LECs the lion's share of the costs of exchanging traffic across networks simply because LECs have a far larger embedded customer base,

^{42/} See Notice at ¶ 74.

resulting in greater call termination on the LEC network. Adoption of a uniform, inflated rate thus would hinder the Commission's efforts to transition the local loop to a competitive environment.^{43/}

Last March, Cox introduced into the record a survey conducted by Dr. Gerald Brock that used LEC data to determine the incremental cost of call termination on a LEC network.^{44/} The data support the conclusion that the national average incremental cost (expressed on a per minute of use basis) is 0.2 cent per minute, with costs at zero during the non-busy hours and higher at the busy hour.^{45/} Because the busy hour is a rare event (occurring several times a year), the cost for the termination is effectively zero virtually all of the time.

It is telling that this 0.2 of a cent per minute incremental cost has been in the record for nearly a year and no LEC has yet disputed its accuracy. The FCC should not engage in

^{43/} Cox believes that, if traffic is roughly balanced, the superior method of reciprocal compensation on a long term basis also is bill and keep.

^{44/} See supra n.26.

^{45/} Within a telecommunications network, the volume of traffic, e.g. load, does not remain constant during every period of every day. It may peak during certain periods of the day, particular days of the week, in particular seasons of the year. Landline telephone calling patterns show that there are usually two or three periods during the year when daily peaks are higher than normal (busy seasons.) See generally Engineering and Operations in the Bell System, Technical Publication Department, Bell Laboratories, at 151-152 (Second Edition, 1984). Most of the costs of service, e.g. switch investment, switch maintenance, interoffice transport and call attempt costs, are related entirely to the capacity of the plant required to serve these busy seasons rather than the number of minutes used. Accordingly, the costs of carrying off peak traffic approximates zero, with peak period costs significantly higher. Id. at 23-24; "Price Structure Issues In Interconnection Fees," Report Prepared by Gerald W. Brock for Teleport Communications Group at 4-5 (March 30, 1995).

the pointless exercise of instituting investigations of LEC or CMRS "costs" when the Brock survey and other sources provide readily available, sensible cost proxies upon which the FCC can rely in establishing a pro-competitive model for LEC-to-CMRS interconnection.^{46/} In this regard, it is instructive that the TCA directs both the FCC and the states to use cost proxies rather than engage in cost of service studies to determine costs for network elements, transport and termination.

Bill and keep is a far less regulatory option than others identified in the Notice and it can be implemented without the delay and substantial regulatory costs associated with developing the alternative proposals identified in the Notice. Accordingly, even when variances exist in traffic levels over time, the bill and keep approach is superior to any attempt to develop a set of cost-based termination charges, particularly since every indication is that the relevant costs are virtually zero.^{47/}

As recently emphasized by the Wireless Telecommunications Bureau's Chief Economist, an interconnection policy that is only marginally different from prior common

^{46/} See Notice, Separate Statement of Commissioner Rachelle B. Chong, (released December 15, 1995) ("[An] approach requiring detailed cost justification may not strike an appropriate balance of fairness, efficiency, and expedition. It may be that a less regulatory option, such as employing a reasonable proxy for cost-based pricing, would better serve the public interest"). See also, Mitchell Bridger, Incremental Costs of Telephone Access and Local Use (Santa Monica, Calif: The Rand Corporation, 1990), summarized in "Incremental Cost of Local Usage," Gerald W. Brock, filed in CC Docket 94-54 on March 21, 1995.

^{47/} See 47 U.S.C. § 252(d)(1)(A)(i).

carrier decisions does not advance the immediate goal of fostering competition.^{48/} Cox urges the FCC to establish a competitive framework distinct from prior interconnection policies that, to date, inadequately have reflected the competitive capabilities of emerging wireless service providers. Cox also counsels against the adoption of methodologies that may result in inflated estimates of interconnection costs. Especially high estimates will distort the market and prevent CMRS providers from offering flexible service packages that will compete with traditional LEC services. Only experience with reformed arrangements will tell whether there is a need to develop alternatives to bill and keep. And it is plain that the Commission should not await the development of long term solutions prior to adopting bill and keep as an interim solution. Indeed, deliberations on appropriate long term solutions may benefit from the findings gathered from interim bill and keep arrangements.

3. **Pricing Proposals (Interim, Long Term, Symmetrical).**

a. **Peak Load Pricing Proposals Should Be Rejected.**

Under one theory discussed in the Notice, network capacity costs for LEC-to-CMRS interconnection could be recovered through traffic-sensitive rates for peak-period traffic, with lower rates for off-peak usage, because "the cost of [network] capacity is a function of the volume of traffic [carried on network] facilities."^{49/} The Notice alternatively proposes that

^{48/} See "The Local Loop, Interconnection, and the Velveteen Rabbit," Remarks by James Coltharp, Chief Economist, Wireless Telecommunications Bureau, Federal Communications Commission (delivered at CTIA Policy Conference, February 16, 1996).

^{49/} See Notice at ¶¶ 44-5.

bill and keep be limited only to "off-peak" LEC-to-CMRS interconnection traffic, with usage-based charges for "peak" LEC-to-CMRS interconnection traffic.^{50/} As shown below, however, peak-load pricing for LEC-to-CMRS interconnection is not a viable approach. Moreover, limiting the application of bill and keep to "off-peak" traffic would contradict existing Commission precedent, delay the implementation of bill and keep generally, and hamper the rapid deployment of CMRS networks to consumers.^{51/}

As an initial matter, it is far from certain whether a "peak" can reasonably be defined for LEC-to-CMRS interconnection traffic. The Commission previously has recognized the problems in defining a "peak", stating:

There are . . . many different "peaks" which occur within the telephone network (e.g., "fixed busy hour"; "bouncing busy

^{50/} See Notice at ¶ 61.

^{51/} The initial Brock Interconnection Paper filed in September 1994 in Docket 94-54 by Comcast Corporation identifies the competitive harm that can result from interconnection arrangements that employ usage-based pricing during peak periods and bill and keep for off-peak periods. Addressing an interconnection agreement entered into between NYNEX and Teleport, Brock concludes that:

[w]hile the structure of the NYNEX-Teleport agreement is beneficial for equating termination charges to cost during the off-peak period, it does not in itself solve the problem of increasing market power through high charges If the established price for a channel of given capacity is set far above cost, then the company with market power could engage in [traffic] manipulation. For example, with a very high priced channel, NYNEX could choose to not terminate traffic through Teleport during the peak hour while Teleport would have little choice but to terminate traffic through NYNEX. That could cause Teleport to pay rates for termination that were high enough to reduce the benefits of competition.

Brock Interconnection Paper at 26-7.

hour") and the proper definition of peak for determinations of . . . quality of service in terms of blocked calls is, in large part, a matter of judgment.^{52/}

Identifying a peak calling period, even for voice-only wireless services, thus may encompass such a wide variety of "peaks" as to make the entire pricing concept untenable.

Developing a peak pricing model also is far more involved than the Notice's discussion reflects. A pure peak load usage based pricing model would require very high rates at peak, with zero rates off-peak. However, the engineering peak is likely to occur over a relatively short amount of time and, as the Notice acknowledges, callers could easily shift their network usage to adjacent hours when the rates are zero.^{53/} In order to reduce this demand shifting phenomena, a peak pricing scheme would have to spread the peak over a significant amount of time to generate a modest differential between peak and off-peak usage. However, a long peak period also reduces the efficiency of peak period pricing by assessing high rates for hours that are not peak and therefore do not impose additional capacity requirements.

There is no real solution to the short peak demand shift/long peak inefficiency if usage based rates are employed. This dictates that the Commission should drop any attempt in the interim period to differentiate "peak" and "off-peak" for bill and keep.

^{52/} See Id. at 174 n.30 (citing Engineering and Operations in the Bell System, at 475, Bell Telephone Laboratories (Indiana: Indiana Publication Center 1980)).

^{53/} Notice at ¶ 45.

Peak-load pricing also suffers from inaccuracy to the extent that the widely varying technologies encompassed by LEC-to-CMRS interconnection traffic may each have different demand "peaks." As the Commission previously has recognized:

[among] a considerable range of telecommunications technologies [e]ach may have different marginal costs at peak, and some may only be used at peak.[] Many facilities, such as switches, are used in tandem. Each of these may be used in common with other services and customers and may have a different time-of-day demand profile. In other words, peak demand for one unit of plant may not correspond to peak demand for another.^{54/}

Even assuming peak-load pricing using usage based rates did not have anticompetitive effects, it is not possible to develop a methodology to separate LEC-to-CMRS interconnection traffic into peak and off-peak categories quickly. The Commission in the past has acknowledged the difficulties of establishing peak and off-peak categories.^{55/} Peak-

^{54/} See *Id.* at 177 (footnote omitted). The Commission subsequently found that "individual items of equipment such as switches, multiplexers, or trunks, which may involve relatively large capital expenditures, frequently have differing time-of-day demand profiles." See American Tel. & Tel. Co. Revisions to Tariff F.C.C. No. 259, Wide Area and Telecommunications Service (WATS) and Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, Memorandum Opinion and Order, 86 FCC 2d 820, 832 (1981).

^{55/} In its tariff review of AT&T's WATS rates the Commission stated that "it may be very difficult and time consuming for AT&T and this Commission to develop a near-optimal peak/off-peak pricing structure using time-of-day sensitive rates and other devices." See American Tel. & Tel. Company; Revisions to Tariff FCC No. 259, Wide Area Telecommunications Service (WATS), Memorandum Opinion and Order, 84 FCC 2d 158, 177-8 (1980) (emphasis added). Even then, the Commission identified a "number of theoretical difficulties" regarding peak-load pricing, including "the relationship between accounting and economic costs, and general uncertainty as to the consumer decision-making

(continued...)

load pricing would involve the Commission and the wireless industry in protracted inquiries and administrative proceedings of dubious merit that neither can afford.

In sum, developing a usage-based peak-load pricing scheme for LEC-to-CMRS interconnection will create unacceptable delay in the delivery of competitive wireless services to customers. A usage based peak-load pricing mechanism also would create more problems for LEC-to-CMRS interconnection than they could possibly solve. Accordingly, the Commission should adopt its tentative conclusion that interim application of bill and keep to all LEC-to-CMRS interconnection provides an administratively and economically efficient pricing mechanism that also closely approximates the operation of free market forces.^{56/}

Over the long term, both the TCA^{57/} and economic theory support the application of reciprocal incremental cost approaches to the mutual exchange of traffic among co-carriers. Bill and keep appropriately is recognized as a form of reciprocal compensation that reasonably approximates incremental cost and that promotes interconnectivity and competition over the long term. As a wide majority of states have come to appreciate as they have examined interconnection alternatives, bill and keep reflects an appropriate approximation of

^{55/} (...continued)
process." See Id. at 178 n.43 (citing Electric Utility Rate Design Study, Ratemaking: Topic 5 and Illustrative Rates for Five Utilities (Palo Alto, Calif., EPRI, June 6, 1977)).

^{56/} See "Price Structure Issues in Interconnection Fees," Gerald W. Brock, prepared on behalf of Teleport Communications Group, dated March 30, 1995.

^{57/} The TCA requires that charges for the transport and termination of traffic be mutual, reciprocal, and based on incremental costs. See 47 U.S.C. § 252(d)(2)(A)(i) and (ii). Bill and keep is expressly recognized by the TCA as a form of reciprocal compensation that meets these statutory requirements. See 47 U.S.C. § 252(d)(2)(B)(i).

costs because when the cost of keeping track of and billing for the traffic is subtracted from the incremental cost of terminating it, any remaining cost is so small that it can legitimately be ignored. Bill and keep also causes no harm to LECs in the short term; if anything, LECs for years have recovered unjustifiably inflated interconnection charges from cellular operators and have failed to pay cellular carriers for call termination, thereby reaping a huge windfall. Any LEC suggestions that LECs are entitled to subsidies from interconnecting competitors should be firmly rejected as uneconomic and anticompetitive.

b. Symmetry in Compensation Arrangements Between LECs and CMRS Providers Is Essential To Deter Anticompetitive Practices by Incumbent LECs.

The Notice tentatively concludes that LEC-to-CMRS interconnection rates should be symmetrical -- that is, LECs should pay CMRS providers the same rates as CMRS providers pay LECs.^{58/} Cox agrees that symmetry of interconnection arrangements is necessary in a co-carrier relationship because both carriers bring the particular benefits of their network facilities and functions to the interconnection arrangement. Both federal and state regulators recognize the benefit of symmetrical bill and keep interconnection arrangements as a means of expanding network efficiencies.^{59/}

^{58/} See Notice at ¶ 38. Under a bill and keep regime, such rates would be zero.

^{59/} As previously discussed, most state regulators who have addressed the issue already have implemented symmetrical bill and keep requirements for interconnection between LECs and their landline competitors. See Washington Order at 29; Oregon Order at 53-4.

In contrast, current asymmetrical LEC-to-CMRS interconnection arrangements favor LECs and lead to anticompetitive results. When CMRS providers must pay LECs far in excess of their costs for interconnection and CMRS providers cannot recover their costs from the interconnecting LEC, there is an unacceptable asymmetry. The Commission should not, however, replace this arrangement with one where the LEC is required to pay the CMRS provider its costs. Such a system where each carrier bills the other for its system-specific costs will not create the same efficiencies of an interim bill and keep. Symmetry is a necessary element of the co-carrier relationship.

CMRS networks also are entitled to LEC interconnection on a bill and keep basis because CMRS providers will make comparable quality network infrastructure -- such as wireless switching, microcell and picocell spectrum management, advanced roaming, state-of-the-art wireless signaling and routing network information -- available to LEC subscribers. Symmetrical LEC-to-CMRS interconnection arrangements reflect the fact that CMRS operators provide the same valuable network functions, features and information for the completion of calls (albeit using different technology) as do the LECs.

c. **The Commission Should Allow for Bill and Keep at Any Points Where a CMRS Provider and a LEC Agree to Meet.**

The Notice's tentative conclusion that bill and keep should apply for terminating calls at the LEC's end office fails to comprehend the co-carrier status of interconnecting CMRS

and LEC networks.^{60/} As previously noted, introducing any part of the existing access charge structure into the CMRS interconnection framework creates two very serious problems -- access rates are too high and usage based rate structures substantially limit the freedom of the CMRS provider to offer innovatively priced service offerings. Accordingly, the Commission should drop the end office proposal and adopt a more general approach to formulating mutual interconnection policy.

Specifically, CMRS providers should be able to obtain bill and keep at any point of interconnection to the LEC network, whether it occurs at an end office, a tandem switch or at several end offices and tandems, and LECs similarly should be entitled to bill and keep regardless of where they interconnect to the CMRS network.^{61/} If bill and keep is available only at the end office, the LECs will impose discriminatory interconnection rates upon CMRS providers who interconnect at the tandem, even when tandem interconnection is a more efficient form of interconnection for both networks. The TCA and state regulations for

^{60/} See Notice at ¶ 62.

^{61/} In an October 1995 ex parte filing Cox addressed anticipated LEC arguments to bill and keep. In that document Cox focused solely on the features and functions the LEC network would provide the CMRS operator and observed that bill and keep at the LEC end office might be acceptable. See Ex Parte Letter from J.G. Harrington, Counsel for Cox Communications, to Mr. William F. Caton, Secretary, Federal Communications Commission, filed October 19, 1995 ("Cox Ex Parte"). When the full scope of the interconnection relationship is considered, however, Cox submits that bill and keep at a zero rate with meet points more appropriately reflects the fact that the CMRS network is also providing a network with advanced features on which LEC customers can terminate their calls.

landline competitors do not distinguish between points of interconnection for purposes of defining the applicability of bill and keep model, and neither should this Commission.

Several states require that bill and keep be provided at any mutually agreeable point between the LEC and competitive LECs. The California PUC, for example, requires that LECs provide bill and keep at any "mutually agreeable point of interconnection."^{62/} The California PUC explained that:

The environment most conducive to a level playing field is one in which parties have flexibility to negotiate terms and conditions for interconnection which are best suited to their specific needs. Accordingly, we will not require any fixed number of [points of interconnection] that a [competitive local exchange carrier] or LEC must have or dictate where the POIs must be located.^{63/}

The Washington UTC also ordered bill and keep at "meet points" to be negotiated in good faith by LECs and interconnecting parties. In requiring meet-point interconnection, the Washington UTC observed that "[i]nterconnection rules should not force one company to adopt the architecture of another or to incur costs over and beyond what is necessary to interconnect with a competitor."^{64/} These state decisions evidence the competitive benefit to

^{62/} See Order Instituting Rulemaking and Investigation on the Commission's Own Motion Into Competition for Local Exchange Service, Decision 95-12-056, The Public Utilities Commission of the State of California, R.95-04-043, I.95-04-044 (released December 20, 1995) at Appendix C, 14 ("CPUC Interim Interconnection Order").

^{63/} See CPUC Interim Interconnection Order at 21.

^{64/} See Washington Order at 46.

be gained from requiring bill and keep at any interconnection point mutually agreed upon by the parties. They further demonstrate that meet point interconnection is workable and fair.

Moreover, the TCA imposes a duty upon all LECs "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."^{65/} The TCA also permits bill and keep as a form of reciprocal compensation and, notably,^{66/} does not limit its application to any particular point of interconnection. It thus is reasonable to assume that under the TCA, bill and keep will be implemented not only at end offices, but also at tandem switches.

The Commission should refine the Notice's proposal and require that LECs provide bill and keep at any point where CMRS providers interconnect to the LEC network. Any transport costs incurred by LECs in providing interconnection to CMRS providers, and vice versa, at any point, including the end office, should be subject to bill and keep and "meet points" negotiated by the parties.

Under this arrangement, each carrier would have the obligation to carry traffic half the distance between its meet point and the other carrier's meet point, where it theoretically would be handed off. The connecting trunk would be a shared cost that might be jointly owned or might be physically provided by one carrier with the other paying its share. However, the money owed by one carrier to the other would only be for the facilities

^{65/} See 47 U.S.C. § 251(b)(5) (emphasis added).

^{66/} 47 U.S.C. § 252(d)(2)(B).

involved in establishing the meet point and not for all the facilities involved in terminating the call. If parties negotiated these meet points in good faith, they would agree to exchange traffic at a number of additional points when doing so would be less costly than sending all traffic through a single point.

In short, it is economically inefficient to require co-carriers to pay more for tandem switched traffic than for end office traffic, or to limit bill and keep only to LEC end office traffic. Once bill and keep is mandated as an FCC interconnection policy, LECs and CMRS providers can negotiate directly to establish meet points for interconnection and to determine how to share the costs of meeting each other to exchange traffic.

B. Implementation of Reciprocal Compensation Arrangements.

1. Negotiations and Tariffing.

[No comments at this time.]

2. The FCC Has Jurisdiction to Order Bill and Keep as Both an Interim and As a Permanent Interconnection Arrangement.

As acknowledged in the Notice, Congress has explicitly vested the Commission with exclusive jurisdiction over CMRS rates.^{67/} Cox's analysis, with which the Commission is acquainted, established that the 1993 Budget Act grants the Commission exclusive jurisdictional authority to order bill and keep as the mutual compensation model for all

^{67/} Notice at ¶ 96-97.

LEC-to-CMRS interconnection.^{68/} Nothing in the TCA diminishes this authority and the Commission therefore should establish LEC-CMRS interconnection rules promptly and on a national basis.

a. **The 1993 Budget Act Federalized CMRS Rates,
Including LEC Rates for CMRS Interconnection,
Because CMRS Was Classified as an Interstate Service.**

The Communications Act of 1934 (the "Act") established a dual regulatory structure for interstate and intrastate wireline communications. Section 2(a) of the Act gives the Commission exclusive jurisdiction over "all interstate and foreign communications by wire or radio"^{69/} Section 2(b) limits the Commission's jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications"^{70/} In interpreting Section 2(b), the Supreme Court has held that the Commission is precluded from preempting state telecommunications regulations when they are severable from interstate regulations or when they do not conflict with Federal policy.^{71/} Thus, prior to the 1993 Budget Act, the Commission did not exercise any authority over the intrastate rates of LEC interconnection provided to radio common carriers. The

^{68/} See Notice at ¶¶ 100-103. The Cox Memorandum explains in detail how the 1993 Budget Act gave the Commission exclusive jurisdiction over all CMRS rates including interconnection, and because the Commission is aware of the contents of the Cox Memorandum, only the essential components are discussed below. See *supra* n.61.

^{69/} 47 U.S.C. § 152(a).

^{70/} 47 U.S.C. § 152(b).

^{71/} See, e.g., *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355 (1986).

Commission did preempt state regulation over the physical interconnections between a radio common carrier and a LEC, finding that interstate and intrastate physical interconnections are inseparable,^{72/} but it permitted the states to regulate intrastate interconnection rates.^{73/}

By 1993 Congress recognized that mobile, wireless communications services are increasingly offered on a multi-state, regional or nationwide basis. Congress sought to foster the nationwide growth of wireless communications services by amending Section 2(b) and by directing the Commission to establish a uniform federal regulatory framework for all mobile services. The significance of this expansion of the Commission's jurisdiction cannot be overstated.

The 1993 Budget Act changed the Commission's jurisdiction over CMRS and LEC-to-CMRS interconnection rates by providing that:

Notwithstanding section 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service. . . .^{74/}

and by adding a limiting main clause to Section 2(b) providing that:

^{72/} The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 2 FCC Rcd 2910, 2912 (1987).

^{73/} The Commission did determine that if intrastate interconnection rates are high enough they can negate the federal right of interconnection and could be subject to preemption. *Id.* The Commission's authority to preempt state interconnection rates under this theory was never tested because cellular service was not regarded as a substitute for wireline service and the cellular industry was able to pass through interconnection rates that were far above actual costs to cellular customers willing to pay a premium for mobility. CMRS providers offering service as an alternative to the landline network will not, however, be able to pass through excessive costs to customers and address the mass market.

^{74/} 47 U.S.C. § 332(c)(3) (emphasis added).

Except as provided in section 223 through 227 of this title, inclusive, and section 332 . . . , nothing in this chapter shall be construed to apply or to give the Commission jurisdiction [over intrastate telecommunications].^{75/}

Under this revised framework, the States retain jurisdiction to regulate the "terms and conditions" of CMRS service delivered to end users and can petition the Commission to regulate CMRS rates when CMRS becomes a substitute for landline telephone service.^{76/} In the meantime, CMRS is a wholly interstate service and any interconnection to a CMRS provider, regardless of the source, is an interconnection governed by the FCC's interstate

^{75/} 47 U.S.C. § 152(b) (emphasis added).

^{76/} 47 U.S.C. § 332(c)(3). The Budget Act's use of the phrase "terms and conditions" to delimit the scope of state authority not otherwise preempted was specifically distinguished from the phrase "terms and conditions" of interconnection. In preserving state authority over "terms and conditions" of CMRS, the 1993 Budget Act refers to "such matters as customer billing information and practices and billing disputes and other consumer protection matters." See H.R. Rep. No. 103-111, 103rd Cong., 1st Sess., at 260. The Commission retains exclusive jurisdiction to ensure that "terms and conditions" of interconnection between LECs and CMRS providers are just, reasonable and nondiscriminatory. See 47 U.S.C. §§ 151, 154(i) and 201. Because mutual compensation is both a rate and a "term and condition" of interconnection, the Commission has exclusive jurisdiction to ensure the availability of interconnection between LECs and CMRS providers on a just, reasonable and nondiscriminatory basis. Further, because the 1993 Budget Act federalizes substantive regulation of CMRS, the interconnection provided between LECs and CMRS providers has become entirely interstate in nature. LECs may argue that because interconnection is technically the same today as it was before the 1993 Budget Act, regulation of interconnection need not and should not change. These LEC arguments are misleading and should be discarded. Cox does not dispute that the technical relationship between the LECs and CMRS providers has not changed; rather, the regulatory background which governs LEC-to-CMRS interconnection has changed because the Commission's jurisdiction has changed.

jurisdiction under Section 201 of the Communications Act.^{77/} The Budget Act took a formerly jurisdictionally bifurcated matter, LEC-to-CMRS interconnection rates, and made it an exclusively federal matter.^{78/}

Bell Atlantic and Pacific Telesis Group have argued in a recent ex parte letter that the preemptive language in the 1993 Budget Act applies only to the rates charged by CMRS providers to their subscribers, not to the amount CMRS providers must pay for LEC interconnection.^{79/} Such an interpretation is inconsistent with both the language and intent of the 1993 Budget Act that reclassified CMRS as an interstate service and thereby gave the FCC authority over all CMRS rates and not simply rates charged to subscribers. By

^{77/} Section 201 of the Communications Act gives the Commission the authority to regulate interstate common carrier rates. See 47 U.S.C. § 201. Because the 1993 Budget Act made all aspects of LEC-to-CMRS interconnection interstate, the Commission has the authority to regulate LEC-to-CMRS interconnection rates under its general Section 201 rate authority.

^{78/} The language in Section 332(c)(1)(B) also supports Cox's position that the 1993 Budget Act gives the Commission exclusive jurisdiction over LEC-to-CMRS interconnection rates. Section 332(c)(1)(B) further expands the Commission's jurisdiction over CMRS by authorizing the Commission to order any common carrier, regardless of whether it is an intrastate or interstate carrier, to establish physical connections with any CMRS provider. 47 U.S.C. § 332(c)(1)(B). The Commission's previous jurisdiction under Section 201(a) extended only to those common carriers "engaged in interstate or foreign communications." 47 U.S.C. § 201(a). Section 332(c)(1)(B) thus shows Congress' intent that the Commission be given full jurisdiction to regulate all aspects of CMRS including interconnection to and from CMRS providers.

^{79/} See Ex Parte Letter from Michael K. Kellogg, Counsel for Bell Atlantic and Pacific Telesis Group, to Mr. William F. Caton, Secretary, Federal Communications Commission, filed February 26, 1996 ("Kellogg Letter"). But see, Ex Parte Letter from Werner K. Hartenberger and Laura H. Phillips, Counsel for Cox Enterprises, Inc., to Mr. William F. Caton, Secretary, Federal Communications Commission, filed February 28, 1996.

preempting state rate and entry authority over CMRS, Section 332 reserves to the Commission authority to "occupy the field" of substantive CMRS regulation.^{80/} Indeed, the legislative history of the 1993 Budget Act specifically states that when Congress amended Section 2(b) it intended to give exclusive jurisdiction to the Commission over all substantive regulatory matters involving CMRS.^{81/}

Adoption of the Bell Atlantic/Pacific Telesis Group argument could easily lead to situations where CMRS providers who are providing an inherently interstate service are subjected to separate state and federal interconnection rates for that very same service. Even more bewildering and impractical, acceptance of the BOC approach would have the FCC regulating the "CMRS" portion of an interconnection and each one of the States regulating the "LEC" portion of an interconnection -- even though the two portions are simply two sides of the same equation. Not only is this untenably inefficient, but a 50-state patchwork dual jurisdiction rate scenario also is exactly what Congress was trying to avoid by passing the 1993 Budget Act. If CMRS providers face different LEC interconnection rates determined by each state and some of those rates are well above cost, they will have no choice but to

^{80/} See, e.g., FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990) (a preemption clause in the ERISA statute "is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relates [to]' an employee benefit plan governed by ERISA").

^{81/} See H.R. Rep. No. 102-213, 103d Cong., 1st Sess. 494, 497 (1993) ("The Senate Amendment contains a technical amendment to Section 2(b) of the Communications Act to clarify that the Commission has the authority to regulate commercial mobile services.").

reflect those rates in the rates they charge subscribers, with the obvious result that CMRS may be unable to compete with wireline services as intended by Congress.

Bell Atlantic, Pacific Telesis Group and other parties that dispute the Commission's jurisdiction over LEC-to-CMRS interconnection rates are asking the Commission to ignore the explicit directive of Congress.^{82/} By amending Section 2(b), Congress removed state authority over CMRS rates because it made a policy decision that CMRS should be federally regulated. Arguments that interconnection rates and costs are severable or that the states are in the best position to monitor interconnection arrangements are simply irrelevant.^{83/} These parties are asking the Commission to take a position that renders meaningless Congress' amendment to Section 2(b). The position of Bell Atlantic and PacTel is inconsistent with the 1993 Budget Act and would frustrate the development of PCS and other CMRS services as wireless competitors to the landline local loop. While it obviously suits the purposes of the LECs to stonewall, play games of jurisdictional whipsaw and delay in providing CMRS competitors with cost-based interconnection by making CMRS providers run a 50-state gauntlet, the plain fact is that the Commission has the immediate and complete authority to

^{82/} The Bell Atlantic/PacTel ex parte letter never even discusses the Budget Act amendment of Section 2(b), presumably because they cannot explain away the significance of the amendment.

^{83/} See Notice at ¶ 105 citing arguments by the New York State Department of Public Service, the National Association of Regulatory Utility Commissioners, and Pacific Bell.